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COMMENTARY

PERMANENT LEGISLATION TO CORRECT *DURO V. REINA*

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Duro v. Reina

In *Duro v. Reina*[1] the Supreme Court held that Indian tribal courts do not have criminal jurisdiction over nonmember Indians.[2] In so doing the Court extended its earlier holding in *Oliphant v. Suquamish Indian Tribe*,[3] which had prevented tribes from exercising criminal jurisdiction over non-Indians and struck a serious blow to tribal sovereignty.[4] The *Oliphant* decision has been soundly criticized as ahistorical and even dishonest,[5] as well as essentially ethnocentric.[6] The case also posed grave dangers to tribal people, because of the great number of nonmember Indians who live and work on Indian reservations,[7] and the fact that nonmembers fall through the cracks of the

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1. 495 U.S. 676 (1990).

2. *Id.* at 682.

3. 435 U.S. 191 (1978).

4. *Id.* at 199.

5. The majority opinion relied on such dubious sources of congressional intent as unenacted bills. For contemporary criticisms, see, e.g., Russel L. Barsh, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Richard Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 WASH. L. REV. 479 (1979).

6. Milner Ball has argued that *Oliphant* is an ethnocentric manipulation of precedent and invention of the doctrine that Indian tribes were somehow miraculously "incorporated" into the United States. Milner Ball, *Constitution, Courts, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 34-43. Robert Williams has argued that the *Oliphant* doctrine requires tribes to adopt a "legal self-genocide" by accommodating tribal differences to the legal norms of the dominant society in order to be permitted to retain any quantum of self-government. Robert A. Williams, Jr., *The Algebra of Federal Indian Law — the Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 274, 288.

7. Many reservation Bureau of Indian Affairs and Indian Health Service employees are members of other tribes. In addition the need to leave the reservations for schooling and employment has resulted in many marriages of Indian people of different tribes. For an explanation of these and other factors creating large numbers of nonmember Indians on today's Indian reservations, see Miller v. Crow Creek Sioux Tribe, 12 Indian

federal criminal jurisdiction scheme that applies to Indians committing crimes on reservations.[8] Consequently, tribes were helpless to take anything but the most limited action against nonmembers committing misdemeanors on reservations.

During the summer after *Duro* was decided, many Indian tribal officials met to discuss the case and determine both short-term and long-term courses of action. For example, the Southwest Intertribal Court of Appeals held a day-long conference for judges at the American Indian Law Center at which tribal attorneys, tribal judges, law professors, and the Law Center staff debated possible solutions to *Duro*.[9] Tribes universally condemned the decision in *Duro* and the Western Governors Association adopted a resolution urging Congress to study the problem.[10] The states of Arizona, Montana, Nevada, North Dakota, and South Dakota passed resolutions urging Congress to act as well.[11]

Some groups supported the *Duro* decision, however. For example, the Conference of Western Attorneys General adopted a resolution urging Congress to grant the states authority over minor crimes committed on reservations.[12] Those who favored the opinion argued that tribal court systems are not subject to the Bill of Rights. Although this point is true, the fact is that all persons detained under tribal authority may bring a writ of habeas corpus to the federal courts for

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L. Rep. (Am. Indian Law. Training Program) 6008, 6009-10 (Intertribal Ct. App., Mar. 22, 1984) (upholding tribal court jurisdiction over Sioux from one tribe prosecuted by tribal court of another tribe). In addition to members of other tribes, many Indians are not enrolled anywhere, although they are racially and culturally Indian. Some, like the Martinez children in the famous case of Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), are ineligible for enrollment in either the mother's or the father's tribe. Others, like some traditional Hopis, refuse to enroll in the Indian Reorganization Act tribe for political and religious reasons. If the concept of "member" of an Indian tribe necessitates enrollment, these people would not be subject to tribal court jurisdiction.

8. Nonmember Indians, like all Indians, can be prosecuted for committing one of the 13 major crimes. Major Crimes Act, 18 U.S.C. § 1153 (1988). But the jurisdictional scheme existing at the time of the decision did not vest criminal jurisdiction in either the states (other than Public-Law 280 states) or the federal government over crimes committed by nonmembers. *See generally* Robert M. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503 (1976).

9. For a contemporaneous description of some of the proposed solutions, see Nell J. Newton, *Responses to Duro v. Reina*, AM. INDIAN L. NEWSL., (American Indian Law Center, Albuquerque, N.M.), Aug. 1990, at 1 (vol. 23, no. 1).

10. Western Governors Association, Resolution 90-014 (July 17, 1990), *in House Comm. on Interior & Insular Affairs, Hearing of Apr. 11, 1991, on H.R. 972*, 102d Cong., 2d Sess. 215 (1991) (serial no. 102-4).

11. Also, a resolution was before the New Mexico legislature when it adjourned. In addition, 70 legislators from Oregon signed a letter to the Senate Select Committee urging passage of permanent legislation. S. REP. No. 168, 102d Cong., 1st Sess. 47 (1991).

12. Conference of Western Attorneys Gen., Resolution 90-01 (Aug. 3, 1990) (on file with author).

review of civil rights violations,[13] and this was the very route Duro took to get his case before the Supreme Court.[14] In short, all those concerned about keeping order on Indian reservations agreed on the need for immediate action by Congress; on the other hand, not all agreed on what should be done for the long term. In the fall of 1990 Congress enacted temporary legislation to address the problems created by *Duro*, by means of a rider to an appropriations act, amending the definition sections of the Indian Civil Rights Act (ICRA).[15] In response to some of the above concerns about tribal court procedures, a sunset provision was added during the conference on the bill, providing for a cutoff date of September 30, 1991.

Both the use of an appropriations rider and the language of the statute deserve further explanation. The Senate Select Committee on Indian Affairs used a rider on an existing bill rather than introducing completely new legislation, for reasons of speed and efficiency as well as politics. The chair of the Senate Select Committee, Senator Daniel K. Inouye, is also the chair of Defense Appropriations Subcommittee, and thus had a certain amount of influence in the appropriations process.

The mechanism used, amending a definition section of the ICRA instead of enacting a new substantive law, requires a fuller explanation. Congress chose this mechanism to correct the Supreme Court's misinterpretation of congressional intent, instead of creating new legal rights or imposing new legal burdens. This distinction may seem artificial, but the Supreme Court had carefully distinguished between limitations on congressional power and limitations on tribal power beginning with cases as early as *Talton v. Mayes*.[16] In *Talton*, the Court held that the Bill of Rights did not apply to curb action by tribes because tribes are not component structures in the constitutional scheme.[17] Congress had enacted the ICRA, the statute amended by the *Duro*-correction legislation, in order to impose some of the basic principles of the Bill of Rights on Indian tribal governments. The ICRA struck a balance between assuring fundamental fairness in tribal

13. *See* 25 U.S.C. § 1303 (1988) ("The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.").

14. After the tragic death of a 14-year-old boy shot during a fight on the reservation, the Salt River Pima-Maricopa Indian Tribe arrested Duro, a member of a California Indian tribe, for discharging a firearm after a federal indictment for murder arising out of the same incident had been dismissed. Duro subsequently petitioned for habeas corpus pursuant to 25 U.S.C. § 1303. *See* Duro v. Reina, 495 U.S. 676, 681-82 (1990).

15. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(d), 104 Stat. 1893 (codified as amended at 25 U.S.C. §§ 1301-1303 (1988)).

16. 163 U.S. 376 (1896).

17. *Id.* at 382.

government operations and protecting tribal sovereignty. As a result, the ICRA requires tribes to permit defendants to retain attorneys, but it does not impose the financial burden on tribes to pay for attorneys.[18]

With this background in mind, the reason the mechanism of amending the definition section of the ICRA was used, instead of the mechanism of creating new law, comes into clearer focus. Everyone assumes Congress could have created new law by delegating federal power to tribes to try nonmember Indians.[19] This mechanism carries with it conceptual and practical difficulties. The concept of delegation connotes giving to someone something that person does not already have. Thus, a delegation may appear to be conceding that tribes have no such jurisdiction — a concession Congress did not wish to make. Furthermore, if the delegatee has no power in a particular area, the delegatee exercises the power of the person doing the delegation. In other words, a delegation could be viewed as a concession that tribes would be exercising federal power, subject to the full panoply of rights protected by the Bill of Rights, instead of tribal power. Indian tribes apply the principles of fundamental fairness embodied in the Bill of Rights in their tribal courts. Nevertheless, imposing on Indian tribes all of the rules that have been developed in federal and state courts, in cases interpreting the Bill of Rights, would go far to making tribal courts merely adjuncts of the federal courts. This interpretation would hamper the tribal courts' ability to chart their own courses toward just resolution of conflicts without having to be subject to all the procedural protections of Anglo-American law.

In short, although a delegation would have solved a practical consequence of the *Duro* decision by ensuring that tribal courts could exercise authority over nonmember Indians, it would not have reversed the holding in the *Duro* case on the extent of tribal authority. It was the latter as well as the former that Congress wished to achieve. Congress thus chose to correct the Court's misreading of congressional intent, and, in a sense, overturn *Duro*. The Conference Committee Report states Congress's view of the powers of Indian tribes quite clearly: "Throughout the history of this country, the Congress has never questioned the power of tribal courts to exercise misdemeanor jurisdiction over nontribal member Indians in the same manner that such courts exercise misdemeanor jurisdiction over tribal members."[20] Of course, if *Duro* had been a constitutional decision, Congress's

18. The pertinent part reads: "No Indian tribe shall . . . deny to any person in a criminal proceeding the right . . . at his own expense to have the assistance of counsel for his defense." 25 U.S.C. § 1302(6).

19. *See* United States v. Mazurie, 419 U.S. 544 (1975) (upholding congressional delegation of commerce power to bar introduction of alcohol into Indian Country to Indian tribes).

20. H.R. REP. No. 938, 101st Cong., 2d Sess. 133 (1990).

ability to overturn it would be greatly limited, for the Supreme Court is the final arbiter of what the Constitution means.[21] In other words, if the Court held that the Constitution somehow prevents tribes from having jurisdiction over nonmembers, then Congress could do little to change this result.

The good news is that the Court appeared to base its decision on federal common law, law the federal courts legitimately create in order to decide a case to further congressional goals in the absence of a clear statutory rule to apply.[22] In this endeavor courts are in fact trying to ascertain congressional intent. This analysis was the basis of the *Oliphant*[23] decision and of *Duro*, as Philip S. Deloria and I have argued elsewhere.[24] If the Court errs in determining congressional intent, Congress can then correct the Court.

For these reasons Congress chose an existing statute dealing with tribal governments and applying to tribal courts, and amended the definition section to make clear to the federal courts that Congress recognizes tribal court jurisdiction is broad enough to include nonmember Indians. As amended, the ICRA definition section reads as follows (the new language is in italics):

> *25 U.S.C. § 1301. Definitions*
> For purposes of this title [the ICRA], the term
> (1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;
> (2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; *and including the inherent power of an Indian tribe, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians;*
> (3) "Indian court" means any Indian tribal court or court of Indian offense; and
> (4) *"Indian" means any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, United States Code, if that person*

21. Katzenbach v. Morgan, 384 U.S. 641 (1966). Compare Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

22. *See generally* Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

23. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (tribal courts have no criminal jurisdiction over non-Indians).

24. *See* Philip S. Deloria & Nell J. Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, FED. B. NEWS & J., Mar. 1991, at 70.

were to commit an offense listed in that section in Indian country to which that section applies.[25]

During the year within which the amendment was effective,[26] several different bills were introduced to make the legislation permanent.[27] As time passed it became apparent there was agreement among tribes and tribal advocates that Congress should continue the approach of recognizing inherent power rather than creating new power for tribes. Disagreement among those supporting a permanent correction arose mainly in whether such a correction should be part of a more comprehensive tribal courts improvement or tribal courts enhancement bill. Several draft bills were circulated designed to deal more comprehensively with tribal court problems by providing for funding and training.[28] Although these bills contained some good, strong language about the role of tribal courts and the importance of increased funding for tribal courts, other provisions, such as the creation of new mechanisms to determine standards to be applied to tribal courts, were more complicated, more controversial, and in need of much closer study.

Congressman Bill Richardson introduced a bill in the House, House Bill 972, that was simplicity itself: "Section 8077 of Public Law 101-511 (104 Stat. 1891) is amended by striking out subsection (d)."[29] In other words, the bill made the earlier correction permanent by removing the sunset provision. After hearings in April 1991,[30] the bill passed the House by a unanimous vote on September 25, 1991.

The legislative path was not as clear through the Senate, however. Senator Inouye introduced essentially the same bill, Senate Bill 962,[31] and a similar, though somewhat fancier version, Senate Bill 963,[32] in

25. Italicized language is quoted from the Defense Appropriations Act for FY 91, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892 (1990) (amending 25 U.S.C. § 1301 (1988)).

26. As stated above, Congress agreed to the inclusion of a sunset provision, limiting the amendment's effect to the year ending September 30, 1991. The effect of this amendment, in my opinion, could not be to make Congress's vision of tribal sovereignty automatically evaporate upon the expiration of the period, but only to signal to a reviewing court that the issue had entered into a phase of serious reconsideration on the cut-off date. In other words, the amendment would no longer be a legitimate source of the current state of congressional policy regarding tribal sovereignty, requiring a reviewing source to consult other sources of congressional intent.

27. S. 962, 102d Cong., 1st Sess. (1991); Indian Tribal Justice Recognition Act of 1991, S. 963, 102d Cong., 1st Sess.; H.R. 972, 102d Cong., 1st Sess. (1991).

28. One of these bills was introduced. *See* The Tribal Judicial Enhancement Act of 1991, S. 667, 102d Cong., 1st Sess.

29. H.R. 972, 102d Cong., 1st Sess. § 1 (1991).

30. *Criminal Misdemeanor Jurisdiction in Indian Country: Hearing on the Duro Decision, Before the House Comm. on Interior & Insular Affairs, House of Rep.* 102d Cong., 2d Sess. (1991) (serial no. 102-4).

31. S. 962, 102d Cong., 1st Sess. (1991).

32. Indian Tribal Justice Recognition Act of 1991, S. 963, 102d Cong., 1st Sess.

the Senate. The major difference was that Senate Bill 963 contained what is known as "Declarations and Findings," language that does not have any technical legal effect but is designed to provide a policy backdrop for those who are reading the legislation. In this provision the bill reaffirmed the government-to-government relationship, Congress's confidence in tribal courts as justice-administering courts, some history of *Duro*, and Congress's belief that tribal courts ought to be funded on the same level as courts of similar size in the state court systems.[33] For example, one of the findings stated: "(9) Despite the Supreme Court's ruling in [*Duro*], the Congress has never acted to explicitly divest tribal governments of their inherent authority to exercise criminal jurisdiction over all Indians on their reservations."[34]

After hearings in May and June 1991,[35] the Senate Select Committee marked up the House version, House Bill 972, in September 1991.[36] Senators John McCain of Arizona, Pete Domenici of New Mexico, Paul Simon of Illinois, and Paul Wellstone of Minnesota strongly supported the bill. Senator Tom Daschle of South Dakota expressed his belief that the Constitution's Bill of Rights should apply to all nonmember Indians, especially because nonmembers cannot vote in tribal elections or run for office. Senator Slade Gorton of Washington had been the biggest critic at the hearings of the plans to correct *Duro*. At the hearings held in May, Gorton lost no opportunity to remind the audience that he argued *Oliphant* in the Supreme Court, for example. Senator Gorton argued that *Oliphant* and *Duro* were constitutional decisions that cannot be changed by Congress. He also stated his belief that tribal court judgments should be reviewable in federal courts.[37] As the result of a behind-the-scenes compromise, the Senate committee added an amendment to the Richardson Bill, House Bill 972, to provide for another temporary two-year extension, instead of the permanment extension that passed the House. The amendment was added in order to ensure quick legislative action before the original bill expired.

The reason timing was so important was because the markup came late in the legislative session when other serious issues, such as the Clarence Thomas hearings and the savings and loan crisis, could be

33. *Id.* § 2.

34. *Id.* § 2, at 3. Alas, this bill did not contain a provision for any more funding, just the statement that it was important.

35. *Impact of Supreme Court's Ruling in Duro v. Reina, Hearing Before the Select Comm. on Indian Affairs*, 102d Cong., 1st Sess., pts. 1 & 2 (1991) [hereinafter *Senate Duro Hearings*].

36. At a markup, the senators on the committee debate and discuss the bill with their staff, agree to changes if necessary and vote. This report is based on my own observations at the markup.

37. *Senate Duro Hearings, supra* note 35, pt. 1, at 21-22.

expected to command more attention from Congress. In such a setting there was no chance the bill would even make it to the floor unless the Committee was able to get the bill on the unanimous consent calendar. When legislation is placed on this calendar, as most of it is, enactment is a quick formality, with no debate. Since even one senator may put a "hold" on a bill, preventing it from going on the unanimous consent calendar, this very fact often defeats a bill. To get a Senator to release a hold requires political acumen and the art of compromise. Senator Gorton and several other Senators had put, or were prepared to put, holds on the bill. With floor time at a premium, the act of convincing the Senate Majority and Minority Leaders, Senators Mitchell and Dole, respectively, Senate, Senator Mitchell, to give the Chairman of the Committee time on the floor would no doubt require calling in quite a few legislative chits and risk a filibuster by the opposition.[38] Thus, the Chairman agreed to a two-year extension and also promised Senator Gorton that the committee would hold hearings if Senator Gorton wished to introduce a bill providing for federal court review of Indian civil rights cases.[39] With the two-year sunset clause, House Bill 972 then passed the Senate on the unanimous consent calendar.

The next step was a conference committee between the House Interior and Insular Affairs Committee and the Senate Select Committee on Indian Affairs. The senators who had agreed to the amendment making the legislation temporary in order to obtain Senator Gorton's agreement not to block the bill felt bound to honor their agreement. Thus, they refused to recede to the House's original permanent legislation at the conference. Although the senators may have expected the House members to recede to the temporary legislation, the House committee members, especially Rep. Miller of California and Rep. Richardson of New Mexico, hung tough — they would only agree to a permanent resolution and refused to accept the two-year sunset clause. Having reached an impasse, the conference committee adjourned. Unfortunately, the date for the expiration of the 1990 temporary *Duro* legislation passed on September 30, 1991.[40]

The adage, "Legislation is like sausage — you may like the end product, but you may not want to know how it is made," is oft-repeated in law school courses. And the *Duro*-correction legislation is no exception. What followed were some behind-the-scenes politicking,

38. Admittedly, a filibuster would seem to be a rather remote risk, given the urgency of the other issues before the Senate at the time.

39. The hearing on this issue was held on November 20, 1991. *Federal Court Review of Tribal Court Rulings in Actions Arising Under the IRCA and Draft Bill to Grant Jurisdiction to Federal Courts to Hear Final Actions from Indian Tribal Courts, Before the Select Comm. for Indian Affairs*, 102d Cong., 1st Sess. (1991).

40. S. REP. No. 168, 102d Cong., 1st Sess. 14 (1991).

an avalanche of telegrams from tribes expressing outrage and concern about the passing of the deadline and the need for a permanent solution.

Whether in response to the last-minute lobbying by tribes and their representatives, the tough stand taken by the House, or both, the Senate Select Committee leadership decided to markup Senate Bill 962, the Senate version which was the same as House Bill 972. In fact, the only difference between the two bills was the fact that certain promises had been made during the markup of House Bill 972 that arguably did not apply to Senate Bill 972. Perhaps the Chairman was particularly eloquent, or perhaps Senator Gorton decided that he could not win if the bill reached the floor. For whatever reasons, Senator Gorton released the Senators who had made a commitment concerning the two-year sunset clause to him (Senators Domenici, McCain, and Inouye). After markup, Senate Bill 962 was placed on the unanimous consent calendar and passed the Senate on October 2, 1991. With two bills having passed the Senate, House Bill 972 as amended, and Senate Bill 962, and one having passed the House, original House Bill 972, the Conference Committee was resumed. Senator Inouye and three house members attended. Senator Inouye formally asked his House colleagues to recede to the Senate version one more time. They just as formally refused, and the Senate receded to the House, thus restoring the bill to its original permanent status.[41]

Two weeks after the temporary *Duro*-correction expired, the Senate enacted the permanent solution, and the President signed it into law on October 28, 1991.[42]

But the Indian law community has not heard the last of this issue, for the law is surely to be challenged and reviewed by the federal courts. In particular, opponents can be expected to argue that the law is only effective as delegated federal power, bringing with it the full panoply of Bill of Rights protections. Moreover, the issue whether federal court review of tribal court judgments is necessary is before the Senate and can be expected to arise repeatedly. In the remainder of this article, I will address four issues that can be expected to dominate the discussion of the constitutionality and wisdom of the law. The rest of this article analyzes these issues: (1) the interpretive issue: whether the law effectively corrected the Court's misinterpretation of congressional intent; (2) whether the Bill of Rights must be applied to tribal courts; (3) whether distinguishing between member and nonmember Indians violates the equal protection principle; (4) whether it is fair for tribes to exercise jurisdiction over nonmembers who cannot vote in tribal elections.

41. At this point the big guys left, and the staffers put together the report.
42. Act of Oct. 28, 1991, Pub. L. No. 102-137, 102d Cong., 1st Sess.

Constitutional and Statutory Analysis of the Duro-Correction — Delegation v. Correction?

As discussed above, great concern was raised that whatever solution Congress adopted be a correction and not a delegation. Recall that the amendment is very simple, because it merely removed the one-year sunset clause from the temporary bill. The amendment's title states it is a bill "to make permanent the legislative reinstatement, following the decision in [*Duro*] of the power of Indian tribes to exercise criminal jurisdiction over Indians."[43] If Congress is in fact "reinstating" tribal power, could it not be argued that Congress is "granting" back to tribes something taken away? At best the law is ambiguous, but members of the Court will look to legislative history to clarify ambiguities.

Certainly there are ample sources of legislative history on this particular bill, with three hearings before two Houses, and numerous reports. Since the amendment merely removes the sunset clause of the previous amendment, the best evidence of congressional intent is the legislative history of the original amendment, which was discussed above. The arguments originally made in the Conference Committee report on the original amendment have been incorporated into the various reports on the latest version, however, including the Conference Committee report. The report also contains very strong language stating that the purpose of the law is to correct the Court instead of granting new power:

> This legislation clarifies and reaffirms the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians on their reservations. The Committee of Conference is clarifying an inherent right which tribal governments have always held and was never questioned until the recent Supreme Court decision of *Duro v. Reina* [495 U.S. 676 (1990)]. The Congressional power to correct the Court's misinterpretation is manifest as is its plenary power over Indian tribes which derives from the Constitution.
>
> The Committee of the Conference asserts that the Congressional power over Indian tribes allows this recognition of the inherent right of tribal governments to retain this jurisdiction and notes that two fundamental maxims of Indian law come into play in this legislation. First, as Justice Kennedy stated in the *Duro* decision, Congress determines Indian policy. Second, Indian tribes retain all rights and powers not expressly divested by Congress.[44] These prin-

43. H.R. 972, 102d Cong., 1st Sess. 1 (1991).

44. This statement is not entirely correct in light of the Court's holding in *Oliphant*.

> ciples go back to the decisions of Chief Justice John Marshall and are part of the foundation of the federal tribal relation. See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).[45]

The other reports, though typically given less weight in the interpretive process, contain similar language. The House Committee report essentially states the same thing as the Conference Committee report and incorporates language from the Conference Committee report on the temporary amendment, quoted above.[46]

The Senate report also contains strong language regarding the inherent status of tribal power:

> From the perspective of most Indian legal scholars and virtually all tribal leaders, the prevailing view is that if Congress had intended to divest Indian tribal governments of jurisdiction over non-Indians, it would have explicitly done so. Instead, the assumption in Congress has always been that tribal governments do have such jurisdiction, and Federal statutes reflect this view.[47]

In sum, it is hard to see how the Court could with any honesty interpret the law as a delegation to the tribes rather than a reaffirmation of a power that tribes already have. This interpretation does not necessarily mean, however, that the Court will uphold the bill. The Court's answers to questions raised below may impel it to find a constitutional basis for overturning the legislation.

Constitutional Questions

Application of the Bill of Rights

How should the dominant society judge tribal courts? Often when discussing this subject with outsiders, it seems that they think that tribes do not want to be subjected to the Bill of Rights because they want full rein to mistreat and abuse those who come before them. What is the argument for leaving tribes free of the Bill of Rights? A reflection about the origins of the Bill of Rights and why it was imposed upon the states can help tribal advocates counter these concerns by comparing states and tribal governments.

As noted, one of the most often-voiced concerns about tribal courts is that they should be subjected to the full array of constitutional

45. COMM. OF THE CONFERENCE, JOINT EXPLANATORY STATEMENT, H.R. 972, H.R. REP. No. 261, 102d Cong., 1st Sess. (1991).

46. *See* H.R. REP. No. 61, 102d Cong., 1st Sess. 5 (1991) (quoting H.R. REP. No. 938, 101st Cong., 2d Sess. 133 (1990)).

47. S. REP. No. 168, 102d Cong., 1st Sess. 3 (1991).

protections, usually meaning the same protections that are applied to defendants in state criminal proceedings. Everyone summoned before a tribal court, whether or not she is a tribal member, is presently entitled to fundamental fairness in accordance with the protections of the ICRA. The ICRA represents a congressional accommodation between the imposition on Indian tribal governments of every specific guarantee of the Bill of Rights as that document has been interpreted in cases arising from state and federal courts and the more basic norm that each person has a right to be treated with fundamental fairness in the criminal process. By imposing statutory obligations to ensure fundamental fairness without imposing every provision of the Bill of Rights "jot for jot" on tribes, the Congress chose to strike the appropriate balance.

Assuming that fundamental fairness requires imposing every constitutional provision that binds the federal or state governments on tribal governments ignores constitutional history and the rich debates in the Supreme Court cases over the core meaning of the Due Process Clause, through which most, but not all, of the guarantees binding the federal government have been applied to the states.[48] The criminal process provisions of the Bill of Rights did not apply to the states automatically, but were placed in the Constitution as bulwarks against excesses of federal power.[49] Nearly one hundred years after the Fourteenth Amendment was enacted, the Supreme Court determined that the concept of fundamental fairness of the Due Process Clause incorporated certain provisions of the Bill of Rights to the states.[50]

These selective incorporation cases represented a judicial trade-off: the Court was reluctant to interpret the concept of due process too broadly, as encompassing any procedures and rights that might be necessary to accord fundamental fairness, because of concerns that the concept would then become so subjective as to permit judges to impose their own concepts of fairness on the states. On the other hand, if the Court were to interpret the Due Process Clause as having been intended by the framers of the post-Civil War amendments to incorporate the entire Bill of Rights to the states, the resulting "total incorporation" would shackle the states with guarantees, such as the right to a jury trial in civil cases in which the amount of controversy

48. This debate is called the "Palko-Adamson" debate after the cases containing well-respected defenses of selective incorporation. *Compare* Palko v. Connecticut, 302 U.S. 319 (1937) (Cardozo, J.) (refusing to incorporate the double jeopardy clause as not implicit in the concept of ordered liberty), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969), *with* Adamson v. California, 332 U.S. 46 (1947) (refusing to incorporate the fifth amendment self-incrimination provision on the same grounds), *overruled in* Malloy v. Hogan, 378 U.S. 1 (1964).

49. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).

50. *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (collecting cases).

is over twenty dollars as well as the grand jury provision. These guarantees would impose great additional costs on the states and interfere with the states' roles as laboratories to develop innovative criminal procedures without providing any concomitant gain to the criminal defendant.

Thus, the Court compromised by adopting the "selective incorporation" doctrine. This doctrine reined in judicial tendencies to give too much subjective meaning to the concept of due process by restricting judges to the language of the Bill of Rights provisions that had been incorporated by the states. On the other hand, only those provisions that were regarded as fundamental would be incorporated, leaving the states free from the requirement of those provisions not regarded as fundamental.[51]

The cases in which the Court applied the selective incorporation doctrine provide valuable insights into both the importance of these clauses in the American scheme of justice and the content that the Court has given to the concept of "fundamental fairness." In these cases the Court accommodated the interests of the individual with the unique role of the states as separate sovereigns in the federal system. In so doing the Court focused not on fundamental fairness as some abstract concept but as a concept rooted in the reality of the procedures of the fifty states as they actually administered their justice systems. In fact, the Court candidly admitted in *Duncan v. Louisiana*[52] that the standard it applied to the state courts was whether the particular constitutional provision was "necessary to an Anglo-American regime of ordered liberty."[53]

As the Supreme Court engaged in this inquiry in determining what provisions of the Bill of Rights to apply to the states, so did Congress in deciding which provisions had to be applied to Indian tribes. Obviously Congress rejected the notion that only total incorporation was fair or even sufficient, for Congress applied a stricter standard to tribal courts than it does to state courts in the case of criminal jury trials for petty offenses punishable by less than six months in jail.[54] Tribal court defendants have a right to jury trial no matter what the classification of the crime. Apart from this one example of Congress imposing a greater obligation on tribal governments, the ICRA applied every other provision in the Bill of Rights relating to criminal procedure except two: the Grand Jury Clause of the Fifth Amendment and the

51. *See generally* Jerold H. Israel, *Selective Incorporation Revisited*, 71 GEO. L.J. 253 (1982).

52. 391 U.S. 145, *reh'g denied*, 392 U.S. 947 (1968).

53. *Id.* at 149-50 n.14.

54. *Id.* at 145.

right to an appointed counsel, held to be within the Sixth Amendment's guarantee of the right to counsel.[55]

Neither of these guarantees is necessary to accord criminal defendants fundamental fairness in the tribal criminal process. The Grand Jury Clause has been held not to be applicable to the states.[56] Moreover, even in federal court, that clause applies by its terms only to prosecutions for felonies.[57] Although *Hurtado v. California*[58] was decided before the Court began to incorporate specific guarantees of the Bill of Rights to the states through the Fourteenth Amendment, most commentators have concluded that the Grand Jury Clause is not essential to a fair system of criminal law.[59] There is little objection concerning a lack of indictment by grand jury in tribal courts. As a consequence, there seems to be no reason in law or policy for Congress to impose such a requirement on tribal courts, whose caseloads are comprised almost completely of misdemeanors.

In fact, the main concern of those who criticize tribal courts is the fact that tribal justice systems are not required to provide appointed counsel for indigents — a requirement of the Sixth Amendment found fully applicable to the states in *Argersinger v. Hamlin*.[60] The answer to those who advocate imposing a right to appointed counsel is not to deny the importance of the right to counsel in state and federal court proceedings, but to explore the reasons the guarantee was applied to the states and compare the states' procedures at that time with those of tribes.

Such a comparison indicates that the Court determined that the right to counsel should be extended to misdemeanors that actually resulted in jail sentences because of two facts that are absent from the tribal court systems. First, that the state was represented by attorneys while the defendant was not.[61] This circumstance is not the case in tribal courts, in which it is still the norm that judges and prosecutors are not law-trained attorneys. Second, the Court was very concerned about plea bargaining and the resulting "assembly line justice."[62] In big city courts with crowded dockets, defendants were prevailed upon to plea bargain in order to dispose of cases as expeditiously as possible. The pressure to bargain was most pronounced in the case of misdemeanors, according to the Court. Accordingly, the Court decided that requiring

55. Argersinger v. Hamlin, 407 U.S. 25 (1972).
56. Hurtado v. California, 110 U.S. 516 (1884).
57. U.S. CONST. amend. V.
58. *Id.*
59. *See, e,g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 2.6, at 57 (1985).
60. 407 U.S. 25 (1972).
61. *Id.* at 26.
62. *Id.* at 35.

a state-appointed attorney would serve to ensure that defendants did not plead guilty to lesser offenses when it was not in their best interests to do so.[63] While plea bargaining is endemic in state court systems, the practice is practically nonexistent in tribal court systems. Thus, the right of appointed counsel for misdemeanors is not as fundamental to a fair scheme of tribal justice.

This history is important, because the analysis used to apply these guarantees to state court proceedings, while essentially sound, has absolutely nothing to do with tribal courts. Tribal courts do not trace their roots to the English common law as do state courts. Tribal courts are not part of an "Anglo-American regime of ordered justice." Nevertheless, tribal courts are justice-administering courts that trace their roots to a nonadversary system of justice, while struggling to chart their own course by melding those aspects of the Anglo-American system the dominant society has imposed upon them with Indian traditions of listening and judging.

In conclusion, neither of the provisions omitted from the ICRA is necessary to fundamental fairness in the tribal criminal justice system.

The Equal Protection Argument

Senator Gorton has argued that exercise of jurisdiction by a tribal government over a nonmember Indian, but not a non-Indian, would violate equal protection as an impermissible racial distinction.[64] He is wrong. Tribes are not constrained by the Constitution.[65] Tribes are constrained by the equal protection principle of the ICRA, however. Even if we interpret that statutory injunction as having the same meaning as the constitutional provision, it is not impermissible racial discrimination for the federal government to subject Indians to federal criminal jurisdiction. Tribal courts should be able to make such distinctions in their criminal schemes.

The judicially-developed definition of "Indian" for purposes of the Major Crimes Act has a racial component. While some quantum of Indian blood is always necessary for a person to be classed as an "Indian" for purposes of the Major Crimes Act,[66] a person who is a full-blooded Indian racially may nevertheless not be regarded as an Indian subject to the federal jurisdiction. The most often-used example refers to members of terminated tribes. Because the government has terminated the political relationship with the person's tribe, that person is no longer subject to federal criminal jurisdiction as an Indian. Not

63. *Id.* at 31.

64. *Senate Duro Hearings, supra* note 35, pt. 1, at 22 (statement of Sen. Slade Gorton).

65. *Talton*, 163 U.S. at 376.

66. 18 U.S.C. § 1153 (1988).

every use of the term "Indian" in any given federal law should be treated ipso facto as a political classification, but should be scrutinized to ensure that the classification is not actually motivated by racial animus.[67] The Supreme Court originally interpreted the term "Indian" in the federal criminal statutes as a strictly racial term,[68] but that case was decided at the time the government was actively trying to destroy Indian tribes as political units. In the twentieth century the federal courts have quite properly interpreted the term as requiring identification in the community as an Indian — not in the narrow sense of being an enrolled tribal member, but in the broader sense of being the member of a tribal community.[69]

Moreover, I cannot help point out the following irony: if any event has forced Indian tribes to accord separate treatment to some Indians as opposed to all non-Indians, it has not been the tribes' decision. Tribal officials do not seek to overturn *Oliphant*, not because they do not wish to exercise criminal misdemeanor jurisdiction over non-Indians, but because they are sufficiently pragmatic to accept that the white majority in this country will never countenance the return to tribes of jurisdiction over non-Indians. Nevertheless, before *Oliphant* tribes had the opportunity to treat exactly the same all defendants charged with misdemeanors of whatever race. It was the judicial branch's action that resulted in the present system.

Extension of the Franchise to Nonmember Indians

As completely strange as it must seem to most tribal people, some have argued that Congress should require tribes to extend the franchise to nonmember Indians as a condition of tribal court criminal jurisdiction over them. This question can only intelligently be analyzed by distinguishing between two important categories of nonmembers: resident nonmembers and nonresident (or transient) nonmembers.

Let us start with the easiest case: nonresident, transient nonmembers, illustrated by the often-cited example of the person of Cherokee lineage who just happens to drive through Toppenish, Washington, home of the Yakima tribe, and is arrested on probable cause for alleged commission of a misdemeanor. No state government would have to extend citizenship to this person in order to exercise criminal jurisdiction over him; neither should any tribal government. The fact that this person

67. Nell J. Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195 (1984).

68. United States v. Rogers, 45 U.S. (4 How.) 567 (1846).

69. *See, e.g.*, St. Cloud v. United States, 702 F. Supp. 1456 (D.S.D. 1988) (noting social recognition as an Indian and enjoying the benefits of tribal affiliation are sufficient to bring a person under the federal statutes); *see also* S. REP. No. 168, 102d Cong., 1st Sess., app. C at 48 (1991) (analysis by American Law Division of the Library of Congress of the meaning of the term "Indian" for purposes of federal jurisdiction).

could decide to move to Washington, establish residency, and thus vote in state elections is beside the point: by definition he has not done so. Objecting that this person will not be subject to the Bill of Rights in exactly the same fashion as those constitutional provisions have been interpreted to apply to state governments is at least an objection that makes some sense. The argument that the reason is that as a transient he is not eligible to vote in tribal elections is completely without merit.

The second category is more difficult: nonmembers who reside on the reservation, yet are not able to participate in the tribal political process by voting or running for office. Again, the example is given of the famous Cherokee who lives in Toppenish, Washington. This person would not necessarily be subject to tribal criminal jurisdiction, of course, unless he was recognized in the community as an Indian. If he was, he would be subject to tribal jurisdiction.

The concern expressed by Senator Daschle is that such people should have the right of all Americans to choose a new domicile and then participate in the political life of the new domicile. To use a stark example from recent history, if a bunch of Rajneeshee religious adherents move to Antelope, Oregon, nothing can prevent them from registering to vote and overtaking the town.

Indian tribes should not be different. The problem with this reasoning is that Indian tribes are different. The United States government's decision to permit tribal governments to exist as quasi-independent sovereigns is a decision not to dictate to them who may share in their political life. States share fully in the political life of the nation, but states are the constituent parts of the nation. By entering into the constitutional compact, states surrendered rights and immunities. The Interstate Commerce Clause[70] has provided Congress with the power to build a national economy; it has also been invoked by the Court to protect the national economy from the parochialism of narrow state interests.[71]

Contrast the role of Indian tribes in the constitutional system. Indian tribes were not part of the constitutional plan, as the Court just reiterated last term.[72] Nevertheless, the United States has become a model for other nations by recognizing Indian tribes' continued right to exist as separate entities. In fact, while the Interstate Commerce Clause has properly functioned to unite the states into one nation, the

70. U.S. CONST. art. I, § 8, cl. 3.

71. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981); Baldwin v. Seelig, 294 U.S. 511 (1935).

72. "[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2583 (1991).

Indian Commerce Clause[73] has properly and consistently functioned as a method to protect Indian tribes from outsiders, beginning with the first Trade and Intercourse Act, passed in 1790.[74] To begin at this point to dictate to tribal governments[75] who may partake in their political communities would be a breach of faith with Indian tribes unprecedented since the Dawes Act of the 1880s;[76] a breach of treaty promises with many tribes; and a violation of developing standards of international law.[77] On a purely practical basis, no tribe would accept such a condition. As a result, the law enforcement problems on reservations, the major concern of this bill, would continue to go unremedied.

Although requiring participation by nonmembers would accord nonmembers voice in tribal governments, it is important to note that although some nonmembers who do *not* reside on reservations have complained about this bill, to my knowledge very few nonmember residents have so complained. Sam Deloria's testimony before the Senate gives one reason:

> [Although enrolled at Standing Rock] I felt that my political power at Pine Ridge and at Sisseton when I lived there was greater than the political power that I feel as a resident of Albuquerque, New Mexico [because] it was a small community. A community where people took some pains to see that my rights were protected and it was also a community that felt itself politically threatened. They knew that if anything happened to me that I would be on the phone to my Congressman, that some newspaper would love to cover it, and somebody would testify about it. So I think that the tribes are probably more aware and sensitive to the rights of non-members who are residents of the reservation than other communities where there might be some analogies.[78]

As Deloria indicated, ensuring the franchise is of little value to minority groups who are grossly underrepresented in the community. A Native

73. U.S. CONST. art. I, § 8, cl. 3.

74. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (current version at 25 U.S.C. § 177 (1988)).

75. *See supra* note 40.

76. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331 (1988)).

77. *See generally* S. James Anaya, The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective (1989) (symposium paper), *in* 1989 HARVARD INDIAN LAW SYMPOSIUM 191 (Harvard Law School Publications Center 1990), *reprinted in* ROBERT M. CLINTON, NELL J. NEWTON & MONROE E. PRICE, AMERICAN INDIAN LAW 1257 (3d ed. 1991).

78. *Senate Duro Hearings, supra* note 35, pt. 2, at 27 (statement of Sam Deloria).

American's ability to vote in Albuquerque, where the Indian population is quite small (although certainly greater than most other American cities), does not give her any clout in the local government. Deloria's residence as a nonmember on an Indian reservation, however, gave him political clout even though he could not vote.

Moreover, Indian nonmembers who reside on a reservation have ties with the reservation community: ties of marriage, kinship, and friendship, and ties based on working for tribal or federal organizations. Tribes do not and simply cannot afford to mistreat nonmember residents. If there is any evidence that these people would prefer to go before a state or federal court rather than a tribal court if they were ever accused of a misdemeanor, I have not heard it.

Conclusion

In short, the Court should uphold the *Duro*-correction as within Congress's power to set the contours of the federal-Indian relationship. The Court has deferred to congressional power over Indian affairs for over two hundred years. It would be shameful for the Court to stop now that Congress has begun taking positive steps to help Indian Country.

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